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Nos. 89-198 and 89-562

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a)(14).

2. Whether compensation-related proposals—such as the proposal in this case to tie the salaries of employees of the Nuclear Regulatory Commission (NRC) to the recommendations of the Advisory Committee on Federal Pay—are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a) to set the agency's budget.

3. Whether the proposal in this case is non-negotiable under 5 U.S.C. 7117, which renders proposals non-negotiable if they are inconsistent with federal law, because Section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d), governs the pay of NRC employees.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-20a)[1] is reported at 879 F.2d 1225. The opinion of the panel (Pet. App. 21a-41a) is reported at 859 F.2d 302. The

[1] "Pet. App." citations are to the appendix to the petition in No. 89-198.

opinion of the Federal Labor Relations Authority (Pet. App. 42a-51a) is reported at 29 F.L.R.A. 217.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on July 14, 1989. The petition for a writ of certiorari in No. 89-198 was filed on August 3, 1989. The petition in No. 89-552 was filed on October 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. 7101 *et seq.*, federal employees have the right to bargain collectively over their "conditions of employment" (5 U.S.C. 7102(2)), which are defined to include "personnel policies, practices, and matters * * * affecting working conditions." 5 U.S.C. 7103(a)(14). The duty to bargain does not extend to proposals that interfere with certain rights reserved by the Statute to agency management, including the right to "determine the * * * budget * * * of the agency." 5 U.S.C. 7106(a)(1). Nor are agencies required to bargain over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).[2]

In this case, the National Treasury Employees Union (the Union), which represents many employees of the Nuclear Regulatory Commission (NRC), submitted a proposal for periodic cost-of-living adjustments. Specifically, the proposal (Pet. App. 4a-5a) called for an annual adjustment "equal to the statistical adjustment recommended to the

[2] Indeed, "to the extent such matters are specifically provided for by Federal statute," they are expressly excluded from the statutory definition of "conditions of employment." 5 U.S.C. 7103(a)(14).

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President" by the Advisory Committee on Federal Pay. See 5 U.S.C. 5306. The proposal further provided that the adjustment would be "unaffected by Presidential or Congressional actions." Pet. App. 4a-5a.[3] The NRC declined to bargain over the proposal.

2. The Federal Labor Relations Authority found the Union's proposal to be within the NRC's duty to bargain. Pet. App. 49a. Relying on its decision in *American Federation of Government Employees and Department of the Air Force, Eglin Air Force Base*, 24 F.L.R.A. 377 (1986), the Authority determined that proposals concerning employee compensation are negotiable "where (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency and (2) the proposals are not otherwise inconsistent with law, Government-wide rule or regulation or an agency regulation for which a compelling need exists." Pet. App. 46a.[4]

The Authority also held that the NRC had not demonstrated that the proposal "would directly interfere with the management's right to determine its budget" since the proposal "does not prescribe a particular program or operation" or a "particular allocation that must be made," but "merely establishes a formula for adjusting * * * salaries." Pet. App. 47a, 48a. Moreover, although the Authority did not dispute the NRC's contention that the proposal "would have a substantial, unavoidable impact on the [NRC's] ability to determine its budget," the Authority held that the NRC had failed to show that the cost increases

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[3] Pursuant to 5 U.S.C. 5306(b)(3), the Advisory Committee on Federal Pay is authorized to "report * * * findings and recommendations" with respect to federal pay to the President, but is granted no substantive authority to establish the pay of federal employees.

[4] The Chairman of the Authority dissented, finding that "wages and monetary fringe benefits * * * are not a proper subject of collective bargaining under the Statute." Pet. App. 51a.

would not be "offset by compensating benefits." *Id.* at 49a. It held that the NRC could not rely on Section 7106(a)(1) for those reasons.

The Authority acknowledged that Section 161(d) of the Atomic Energy Act, 42 U.S.C. 2201(d), governs the compensation of NRC employees and authorizes the NRC "to deviate from pay schedules to the extent such action is 'necessary to the discharge of its responsibilities.' " Pet. App. 47a. However, the Authority stated that it did "not view the language of section 161(d) * * * as placing a specific limitation on the Agency's discretion to bargain in this matter." *Ibid.*

3. After a panel of the court of appeals upheld the Authority's decision (Pet. App. 21a-41a), the en banc court granted rehearing and reversed. *Id.* at la-20a.[5] The court first held that the Statute "does not authorize labor organizations and federal agencies to negotiate over employee pay." Pet. App. 6a. The court found that "[a] plain reading of the text indicates that Congress did not include employee pay within the statutory definition of bargainable matters." *Id.* at 6a-7a. It further concluded that "[n]o intent to permit general public-sector wage bargaining is evident in the [Statute's] language, structure, or legislative history." *Id.* at 7a. Indeed, the court found that the Statute's legislative history was " 'replete' with indications that Congress did not intend to subject employee compensation to collective bargaining." *Id.* at 9a (quoting *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1416 (3d Cir. 1988)).

In addition, as "persuasive alternative grounds for denying enforcement of the FLRA order," five members of the court concluded that the NTEU's proposal would interfere with the NRC's right to determine its budget. Pet. App.

[5] Four of the ten judges dissented. Pet. App. 19a-20a.

13a.[6] The plurality found that the proposal would "divest the NRC of budget-making authority and transfer that authority to the Advisory Committee on Federal Pay," and "would thus clearly 'affect' the NRC's authority to determine its own budget and is therefore nonnegotiable" under Section 7106. *Id.* at 15a.[7]

The plurality also concluded that the proposal is inconsistent with Section 161(d) of the Atomic Energy Act. Pet. App. 13a-18a. It found that the NRC had permissibly construed Section 161(d) to mean that the agency "may not depart from general government pay rates until it determines that such a departure is necessary to the discharge of its responsibilities." *Id.* at 18a. Accordingly, it found the proposal non-negotiable under Section 7117 as well.

ARGUMENT

The first issue presented by the petitions in this case is identical to the first question presented by the petition in *Fort Stewart Schools* v. *FLRA*, No. 89-65, which was granted on October 2, 1989, and the second and third issues in this case are analogous to the second and third questions presented in *Fort Stewart*. Thus, while we believe that the court of appeals' decision in this case is correct, we suggest

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[6] Four members of the court disagreed with that conclusion (Pet. App. 19a-20a), and one member did not reach the issue (*id.* at 19a). A panel of the Fourth Circuit has recently adopted the position of the five-member plurality. *Navy Charleston Naval Shipyard* v. *FLRA*, No. 88-2131 (Sept. 14, 1989), slip op. 5-7.

[7] The plurality noted the Authority's contention that the NRC had failed to demonstrate that the anticipated increase in costs would not be "offset by compensating benefits," but found that "nothing in the statute requires that this showing be made to the satisfaction of the FLRA." Pet. App. 16a. Instead, it concluded that "Congress • • • vested the NRC with the responsibility of balancing employee compensation against the agency's other goals." *Ibid.*

that the Court hold the petitions for disposition in light of *Fort Stewart*.

In *Fort Stewart Schools* v. *FLRA*, 860 F.2d 396 (1988), the Eleventh Circuit held that three proposals concerning the compensation of teachers at schools for the dependents of Army personnel stationed at Fort Stewart, including a proposal specifying a 13.5% salary increase, were negotiable. In reaching that conclusion, the court found, in contrast to the Fourth Circuit in this case, that "Congress did not intend to preclude bargaining over wages and related benefits." 860 F.2d at 402. Moreover, the Eleventh Circuit found that the proposals would not interfere with the Army's right to determine its budget. It reasoned that "[t]he proposals would not necessarily increase the Army's costs," particularly in relation to the Army's total budget, including "bases, troops, weapons, vehicles, [etc.]," and that the Army had not established in any event that there would not be offsetting "compensating benefits." *Id.* at 405-406. Finally, the Eleventh Circuit rejected the Army's argument, under 5 U.S.C. 7117(a)(2), that the proposals were not bargainable because they were inconsistent with an Army regulation for which there was a "compelling need." The court held that there was no compelling need for the regulation, which required the salary schedules at the Fort Stewart Schools to be set by reference to salaries at local public schools, because it concluded that the statutory mandate (20 U.S.C. 241) requiring the Army to provide an education comparable to that provided by local public schools at a comparable per pupil cost could be met without requiring teachers' salaries to be comparable to those at local public schools. 860 F.2d at 405.

On October 2, 1989, the Court granted a petition for a writ of certiorari to review the Eleventh Circuit's decision in *Fort Stewart*. The first question presented by that petition is "[w]hether the wages and money-related fringe

benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable 'conditions of employment' under 5 U.S.C. 7103(a)." That question is in all material respects identical to the first question presented by the petitions in this case. The second question presented in *Fort Stewart* – whether the compensation-related proposals in that case "are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a)(1), to set the agency's budget" – is in many respects the same as the second question here. Thus, if that question is reached by the Court in *Fort Stewart*, its resolution is likely to be controlling here.

Moreover, if this Court reaches the third question presented by the petition in *Fort Stewart* – whether there is a compelling need for the Army's regulation mandating that teachers' salaries be comparable to those at local public schools – the disposition of that question could shed light on the resolution of the third issue raised by this case – whether the Union's proposals are consistent with Section 161(d) of the Atomic Energy Act. In *Fort Stewart*, the court of appeals' determination that there is no compelling need for the Army's salary regulation derived to a large extent from its conclusion that the Army had been granted negotiable discretion by the governing statute, which provides that, "[t]o the maximum extent practicable," per-pupil costs at dependents schools are to be comparable to those at local public schools. 20 U.S.C. 241(e). Similarly, in this case, the petitioners contend that the NRC was granted negotiable discretion because Section 161(d) of the Atomic Energy Act authorizes the NRC to fix the compensation of its employees "to the extent the Commission deems such action necessary to the discharge of its responsibilities." 89-198 Pet. 18; 89-562 Pet. 28. Thus, if this Court concludes in *Fort Stewart* that the relevant statute, which instructs the Army to set salaries in a particular manner but also

grants the Army some discretion, does not open the matter to negotiation, the basis for the lower court's conclusion in this case that the NRC does not have negotiable discretion with regard to the salaries of its employees will be strengthened.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's resolution of *Fort Stewart Schools* v. *FLRA*, No. 89-65.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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